UNITED STATES DEPARTMENT OF LABOR • OFFICE OF ADMINISTRATIVE LAW JUDGES

Whistleblower Newsletter

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AIR21 CASES

TIMELINESS OF COMPLAINT

TIMELINESS OF FILING; EQUITABLE TOLLING; PRECISE STATUTORY CLAIM; MUST INDICATE INTENT TO PURSUE AN AIR21 COMPLAINT

In ***Turgeau v. The Nordam Group***, ARB No. 04-005, ALJ No. 2003-AIR-41 (ARB Nov. 22, 2004), the ARB found that the Complainant was not entitled to equitable tolling of his untimely filling of his AIR21 complaint with OSHA under the "precise statutory claim" ground for such tolling. Complainant had filed a wrongful termination and a "failure to page wages" suit under Oklahoma state law. After removal to federal district court, the suit was dismissed on the ground that it was preempted by AIR21. The Complainant then filed a complaint with OSHA, well beyond the AIR21 limitations period, asserting that "[a]lthough filed in state court, [the Complainant's] Petition raised the identical claim at issue here, i.e., that he was fired from employment with [the Respondent] for reporting matters of FAA compliance and safety." The Board rejected this theory, finding that the Complainant had filed specific state claims, neither of which contained any indication that the Complainant intended to pursue a complaint pursuant to AIR 21.

TIMELINESS OF HEARING REQUEST

TIMELINESS OF REQUEST FOR HEARING; DATE OF RECEIPT BY COMPLAINANT IS DATE OF DELIVERY TO LAST KNOW MAILING ADDRESS RATHER THAN ACTUAL RECEIPT

In ***Robinson v. Northwest Airlines, Inc.***, 2004-AIR-37 (ALJ Oct. 28, 2004), the ALJ interpreted the time period in which the Complainant must file any request for an ALJ hearing on an AIR21 complaint to be triggered by the date of delivery of the OSHA determination. The ALJ noted that the regulation requires a hearing request to be made within 30 days of receipt of the findings and preliminary order, but does not define the term "received." The ALJ concluded, however, date of delivery to the Complainant's address was the correct trigger given the regulatory requirement that OSHA send its decision by certified mail, and given the fact that a complainant could avoid service and hold open his ability to demand a hearing indefinitely if actual delivery was required. The ALJ also ruled that OSHA only needed to send the determination letter to the last know address.

[Editor's note: ***Compare Richards v. Lexmark International, Inc.***, 2004-SOX-49 (ALJ Oct. 1, 2004), which the ALJ found under similar SOX regulations that receipt rather than actual or constructive notice is the regulatory standard. In that case, the ALJ also considered whether presumptive receipt or actual or constructive notice was applicable and concluded that it was not under the facts of the case].

HEARING REQUEST REQUIREMENTS

REQUEST FOR HEARING; FAILURE TO TIMELY SERVE OPPOSING PARTY

In ***Robinson v. Northwest Airlines, Inc.***, 2004-AIR-37 (ALJ Oct. 28, 2004), the ALJ found that the Complainant's representative's failure to serve a letter to OALJ (which had been docketed as a request for hearing even though a hearing was not specifically requested in the letter) had caused no significant prejudice to the Respondent, and therefore did not provide sufficient grounds to dismiss the case. The ALJ, however, dismissed the case because the Complainant's response to the ALJ's order to show cause was that he did not want a hearing but only wanted the OSHA to do its job and investigate the complaint. The ALJ found that the response showed that the Complainant had not simply missed a technical nuance -- he never requested a hearing.

BURDEN OF PROOF AND PRODUCTION ADVERSE EMPLOYMENT ACTION

ADVERSE EMPLOYMENT ACTIONS IN THE CONTEXT OF A RETIRED EMPLOYEE

In ***Friday v. Northwest Airlines, Inc.***, 2003-AIR-19 and 20 (ALJ June 27, 2003), the Complainant, an airline pilot who had voluntarily taken a disability retirement, contended that the Respondent had threatened him with arrest for the unlicensed practice of law and banned him from its property in retaliation for a prior AIR21 complaint and for acting as a witness in another employee's labor grievance arbitration proceeding. The ALJ observed that the AIR21 regulations define

"employee" to mean "an individual presently or formerly working for an air carrier...." 29 C.F.R. § 1979.101. Citing case law decided under similar whistleblower laws, the ALJ concluded that in AIR21 cases "complainants who are former employees are subject to unfavorable personnel actions when the alleged retaliatory act is related to or arises out of the employment relationship in some way." Slip op. at 8 (citations omitted). Thus, in the instant case, the Complainant's burden was to establish that the Respondent's actions "were in some way related to the 'compensation, terms, conditions, or privileges' which arise from [the Complainant's] relationship with [the Respondent] as a medically retired former employee." Slip op. at 9. The ALJ found that the threat to inform a county attorney of a possible unlicensed practice of law had not been shown to constitute an adverse personnel action. The ALJ also agreed with the Respondent that the property ban was unrelated to a present employment relationship or to the compensation, terms, conditions, or privileges owed to a retired employee.

BURDEN OF PROOF AND PRODUCTION
CONTRIBUTING FACTOR

CONTRIBUTING FACTOR; UNPROTECTED HOTLINE COMPLAINT SHOWN TO BE SOLE MOTIVE FOR SELECTION OF COMPLAINANT FOR LAYOFF

In ***Walker v. American Airlines***, 2003-AIR-17 (ALJ Nov. 16, 2004), the ALJ found that the Complainant was not engaged in protected activity when he made a call to the company hotline that was not made in good faith or with a reasonable basis. Following investigation, the Complainant was given a "career decision day" for making an admittedly false hotline complaint. Although the Complainant engaged in other protected activity, the preponderance of the evidence demonstrated that the Complainant was selected for layoff entirely on the basis of there being a "career decision day" discipline in his record. The ALJ also found that there was clear and convincing evidence that the Respondent would have made this decision even if the Complainant had not engaged in protected activities: the company was making layoffs in the immediate wake of September 11, and the Complainant was the only supervisory employee with a record of recent discipline in his file.

BURDEN OF PROOF AND PRODUCTION
CLEAR AND CONVINCING EVIDENCE STANDARD

CLEAR AND CONVINCING EVIDENCE; IN FACE OF POST-SEPTEMBER 11 LAYOFFS, COMPLAINANT WAS THE ONLY EMPLOYEE AT HIS LEVEL TO HAVE RECENT DISCIPLINE IN HIS FILE

See the case of *Walker v. American Airlines*, **2003-AIR-17 (ALJ Nov. 16, 2004**), in the prior section *supra.*

BURDEN OF PROOF AND PRODUCTION
PROTECTED ACTIVITY

PROTECTED ACTIVITY; PARTICIPATION IN INVESTIGATION OF ACTIVITY REASONABLY PERCEIVED TO BE IN VIOLATION OF FAA REGULATIONS

In ***Hendrix v. American Airlines, Inc.***, 2004-AIR-10, 2004-SOX-23 (ALJ Dec. 9, 2003), the ALJ found that the Complainant engaged in protected activity under the AIR21 when he participated in the investigation of an employee who was creating art objects out of company material where the Complainant had the reasonable belief that FAA regulations on the disposal of scrap aircraft parts were not being following. There was no dispute that the manager who initiated the investigation reported specific violations. Thus, even if the Complainant himself did not articulate specific violations, his conduct was protected activity because he was assisting that manager in the investigation, and the AIR21 protects employees who provide or "cause to be provided" information relating to the relevant violations.

PROTECTED ACTIVITY; HOTLINE COMPLAINT MADE WITHOUT A REASONABLE BASIS

In ***Walker v. American Airlines***, 2003-AIR-17 (ALJ Nov. 16, 2004), the ALJ found that the Complainant was not engaged in protected activity when he made a call to the company hotline. The ALJ found that the evidence showed that although the Complainant might have had a good faith belief and reasonable basis for making a hotline complaint about understaffing and deadline pressures, the complaint he actually lodged -- alleging that managers were intimidating him into signing off on tasks that they knew had not been completed or were not safe just so they could get planes off the ground -- was not grounded in good faith or a reasonable belief. The ALJ recognized that the distinction may not seem great, but it was the difference between accusing managers of unknowingly causing safety problems by pushing too hard and intentionally disregarding known safety problems.

ENVIRONMENTAL CASES

[Nuclear and Environmental Whistleblower Digest VII A 5 and X I]
EVIDENCE; PROTECTION OF CONFIDENTIAL OR PRIVILEGED INFORMATION

In ***Wallace v.CH2M Hill Group, Inc.***, 2004-SWD-3, the ALJ addressed the problem of protecting purportedly confidential information disclosed in the course of an administrative adjudication. In ***Wallace v.CH2M Hill Group, Inc.***, 2004-SWD-3 (ALJ Nov. 3, 2004), the ALJ denied a motion for a protective order filed by the Respondent where there were no declarations or affidavits offered in support of the motion and the Respondent's treatment of the issues involved was too superficial. The Respondent's motion would have covered both materials made available in discovery but never filed with the ALJ, and pleadings and evidence that would become subject to FOIA as records of the Secretary of Labor. The ALJ noted that there is a presumptive right of access to adjudicative filings, including before Article I tribunals. The

ALJ granted the Respondent time to submit additional evidence and argument regarding the ALJ's authority and the procedures to be followed. The ALJ later issued a protective order governing the production and use of confidential information during the pendency of the action and thereafter. ***Wallace v.CH2M Hill Group, Inc.***, 2004-SWD-3 (ALJ Dec. 6, 2004) ("Protective Order"). In a separate order, the ALJ voiced doubt that pleadings, motions and materials filed in the record as evidence may be shielded from public disclosure, and therefore declined to make any *a priori* rulings that pleadings may be sealed; rather the ALJ directed the parties to first negotiate the issue and, if unsuccessful, file a motion to seal pleadings, motions or evidence in the same manner as in a U.S. District Court. The ALJ noted that there is a distinction between confidentiality concerns and the invocation of privileges, and directed that if a privilege is claimed, privilege logs should be prepared. ***Wallace v.CH2M Hill Group, Inc.***, 2004-SWD-3 (ALJ Dec. 6, 2004) ("Order on Respondent's Application for Protective Order").

[Nuclear and Environmental Whistleblower Digest VII B 1]
SUBPOENAS; REQUEST FOR SUBPOENAS WHILE CASE PENDING BEFORE THE ARB

In ***Reid v. Constellation Energy Group, Inc.***, ARB No. 04-107, ALJ No. 2004-ERA-8 (ARB Oct. 13, 2004), ***Halpern v. XL Capital, Ltd.***, ARB No. 04-120, ALJ No. 2004-SOX-54 (ARB Oct. 13, 2004) and ***Cummings v. USA Truck, Inc.***, ARB No. 04-043, ALJ No. 2003-STA-47 (ARB Sept. 15, 2004), the ARB denied the requests of pro se complainants to obtain subpoenas from the ARB. The Board observed in each case that the Board acts in an appellate capacity and its decision is based only on evidence considered by the ALJ in the initial hearing.

[Nuclear and Environmental Whistleblower Digest VII C 2]
SUMMARY DECISION; REQUIREMENT THAT COURT PROVIDE NOTICE TO *PRO SE* LITIGANT OF NEED TO FILE RESPONSIVE MATERIALS AND CONSEQUENCES OF DEFAULT

In ***Saporito v. Central Locating Service, Ltd.***, 2004-CAA-13 (ALJ Oct. 6, 2004), the ALJ granted summary decision in favor of the Respondent. In a footnote, the ALJ observed:

> The Eleventh Circuit, under whose jurisdiction this case falls, has held that: "a motion for summary judgment should be granted against a litigant without counsel only if the court gives clear notice of the need to file affidavits or other responsive materials and of the consequences of default." *United States v. One Colt Python,*.357 Cal. Revolver, 845 F.2d 287, 289 (11th Cir. 1992). This court has fulfilled this requirement through its Pre-Hearing Order # 14 (September 3, 2004), in which this Court informed the *pro se* Complainant of his right to file counter-affidavits or other responsive material. Also, this Court continued proceedings in this case until further notice, thus allowing the *pro se* Complainant sufficient opportunity to respond to Respondents' Motion.

Slip op. at n.2.

[Nuclear and Environmental Whistleblower Digest VIII B 5]
ALLEGATION OF BIAS ON PART OF ARB MEMBERS; APPLICABLE LAW, PRESUMPTION OF FAIRNESS

In ***In re Slavin***, ARB No. 04-172 (ARB Oct. 20, 2004), an attorney who was responding the to ARB's order to show cause why the ARB should not give reciprocal effect to a state court's order suspending the attorney from the practice of law argued that the ARB members were biased against him. The ARB wrote:

> With regard to the Respondent's more general contention that the ARB members are biased against him, we point out that Administrative Review Board judges, like administrative law judges and other quasi-judicial decision-makers, are presumed to act impartially. *See Verduzco v. Apfel,* 188 F.3d 1087, 1089 (9th Cir. 1999). To overcome this presumption of fairness, a party must show that a decision-maker has demonstrated prejudgment of the facts and law involved in the case, *see Cinderella Career & Finishing Schools, Inc. v. Federal Trade Comm'n,* 425 F.2d 583, 590-91 (D.C. Cir. 1970), or has a conflicting interest that is likely to influence their decision, *MFS Sec. Corp. v. Securities and Exch. Comm'n,* 380 F.3d 611, 617-18 (2d Cir. 2004). As a corollary to the presumption of fairness, the administrative agency must ensure the appearance of impartiality, as well as observing the procedural safeguards to due process. *Cinderella Career,* 425 F.2d at 591 and authorities there cited. Although a party who challenges the impartiality of an administrative decision-maker is thus not required to establish proof of actual partiality, *Utica Packing Co. v. Block,* 781 F.2d 71, 77 (6th Cir. 1986), the Respondent has failed to raise allegations that indicate either actual bias or the appearance of same.**6**
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> _____
> **6** The ARB is subject to not only the foregoing standards developed in the Federal courts to ensure fairness in agency decision-making but also to the regulations promulgated under the Ethics in Government Act of 1978, as amended, 5 U.S.C.A. App. 4 (West 1996 and Supp. 2002), and the conflict of interest provisions at 18 U.S.C.A. §§ 207, 208 (West 2000 and Supp. 2004), which are found at 5 C.F.R. Parts 2635, 2640, 2641 and 5201. Those regulations require, among other things, the disqualification of Federal employees from participation in matters that pose a conflict of interest or the possibility of an appearance of impropriety. The detailed guidance provided by those regulations aids the ARB in meeting the due process requirement of fairness in appearance as well as in fact. None of the criteria provided by those regulations suggests that it would be improper for any member of the ARB to participate in this decision concerning whether to impose reciprocal discipline.

[Nuclear and Environmental Whistleblower Digest VIII I d and XX E]
INJUNCTION PREVENTING DOL FROM ADJUDICATING WHISTLEBLOWER CLAIM WITHOUT THE INTERVENTION OF THE SECRETARY BASED ON STATE SOVEREIGN IMMUNITY DEFENSE DOES NOT DEPRIVE ARB OF AUTHORITY TO CONSIDER ISSUES NOT DECIDED IN FEDERAL COURT DECISIONS

See ***Taylor v. Rhode Island Dept. of Environmental Management***, ARB No. 04-166, ALJ No. 2001-SWD-1 (ARB Nov. 29, 2004), casenoted at XX E, *infra*.

[Nuclear and Environmental Whistleblower Digest IX D 3]
MOTION FOR RECONSIDERATION BY ALJ; AUTHORITY; TIME LIMITS

In ***Immanuel v. C&D Concrete***, 2003-CAA-18 (ALJ Nov. 17, 2004), the Complainant filed a motion for reconsideration by the ALJ as part of his petition for ARB review. The ALJ noted that relevant caselaw suggests that an ALJ does not have jurisdiction to reconsider after issuance of the recommended decision and order, and that, assuming that he had such authority, the filing deadlines for such motions in similar contexts is often determined with reference to the deadline for filing a petition for review. *E.g., Fowler v. Butts*, 92-WAB-01, 1992 WL 515932 at *2 (June 25, 1992). The ALJ concluded, therefore, that applying the 10 day deadline for filing petitions for review at 29 C.F.R. § 24.8(a), the Complainant's motion for reconsideration was not timely, it being filed well beyond that 10 day period.

[*Editor's note*: The whistleblower regulations drafted for AIR21, SOX and PSI cases indicate that OSHA believes that ALJ's have the authority to reconsider within 10 days following issuance of the initial decision and order. *See* 29 C.F.R. §§ 1979.110(c), 1980.110(c), 1981.110(c).]

In ***Hannum v. Fluor Hanford, Inc.***, 2003-ERA-25 (ALJ Apr. 30, 2004), the ALJ concluded that he did not have the authority to reconsider because he no longer had jurisdiction over the matter once he issued the recommended decision and order (albeit acknowledging in a footnote that there may be authority to correct clerical errors or judgments which had been issued due to inadvertence or mistake).

See also ***Steffenhagen v. Securitas Sverige, AR***, 2003-SOX-24 (ALJ Aug. 13, 2004) (ALJ finding that she did not have jurisdiction to rule on a motion to reconsider when the Complainant also filed on the same day an appeal to the ARB).

[Nuclear and Environmental Whistleblower Digest IX M]
ATTORNEY SUSPENSION BEFORE OALJ AND ARB; RECIPROCAL EFFECT GIVEN TO STATE SUSPENSION

In ***In re Slavin***, ARB No. 04-172 (ARB Oct. 20, 2004), the ARB issued a Final Order Suspending Attorney From Practice Before the Administrative Review Board giving thereby reciprocal effect to a suspension order issued by the Tennessee Supreme Court on August 27, 2004. *Board of Professional Responsibility of Supreme Court of Tennessee v. Slavin*, 145 S.W.3d 538 (Tenn. Aug 27, 2004) (No. M2003-00845-SC-R3-BP). Both the Tennessee Supreme Court and the U.S. Supreme Court denied stays of the Tennessee suspension order. *See Slavin v. Bd. of Professional*

Responsibility of the S. Ct. of Tennessee, No. 04A260 (U.S. Oct. 4, 2004). In ***In re Slavin***, 2004-MIS-5 (ALJ Sept. 28, 2004), the Chief ALJ similarly suspended the attorney from practice before the Office of Administrative Law Judges based on reciprocal application of the Tennessee Supreme Court order suspending Slavin. Similar to the procedure before the ARB, the Chief ALJ had issued a Order to Show Cause, and found that "Mr. Slavin's response to the Order to Show Cause does not establish that the Tennessee proceedings were in violation of due process, were lacking in proof of misconduct, or that a grave injustice would result in giving effect to the Tennessee Supreme Court's judgment. *See Selling v. Radford*, 243 U.S. 46, 50-51 (1917)."

[Nuclear and Environmental Whistleblower Digest XVI A]
CIVIL RIGHTS TAX RELIEF; DEDUCTION FOR ATTORNEYS' FEES AND COSTS INCURRED BY INDIVIDUALS WHO PREVAIL IN EMPLOYMENT DISCRIMINATION CASES

The American Jobs Creation Act of 2004 includes a "civil rights tax relief" provision at Section 703, establishing a deduction from gross income for attorneys' fees and court costs incurred by, or on behalf of, individuals who prevail in employment discrimination and other enumerated types of cases. H.R. 4520, signed by the President on October 22, 2004.

[Editor's note: Pending before the Supreme Court is *Commissioner v. Banks*, No. 03-892, in which oral argument was conducted on November 1, 2004. In *Banks*, the government took the position that a taxpayer's gross income from the proceeds of litigation includes that portion of the damages recovery that is paid to the litigant's attorney pursuant to a contingent fee agreement. Two taxpayers argued that "the governing principle of law should be that income is not to be attributed to anyone who lacks dominion and control or the power of disposition over the amount in question...." *Taxes: Justices Hear Arguments on Treatment of Contingency Fees Paid to Attorneys*, 211 DLR AA-2 (BNA Nov. 2, 2004).]

[Nuclear and Environmental Whistleblower Digest XX E]
STATE SOVEREIGN; REQUEST BY STATE FOR HEARING DOES NOT CONSTITUTE A WAIVER OF IMMUNITY

In ***Migliore v. Rhode Island Dept. of Environmental Management***, ARB No. 04-156, ALJ No. 2000-SWD-1 (ARB Nov. 30, 2004), the ARB rejected the Complainant's argument that Rhode Island waived its immunity from her complaint when it requested a hearing before the ALJ. The ARB observed that "[w]hen the Secretary has not yet intervened and the OSHA investigation yields a finding in favor of the complainant, the State's only option for forcing resolution of the intervention issue is to request an ALJ hearing. … [T]he State's request for an ALJ hearing must be permitted without requiring the State to yield the very immunity that it is seeking to assert." USDOL/OALJ Reporter at 6 [PDF]. The ARB stated that it was expressing no opinion as to how it might dispose of the sovereign immunity issues presented by the case if they arose in other circumstances or outside the First Circuit.

[Nuclear and Environmental Whistleblower Digest XX E]
STATE SOVEREIGN IMMUNITY; REQUEST FOR ALJ HEARING IS NOT A WAIVER OF IMMUNITY; MOTION TO DISMISS BEFORE ALJ BASED ON IMMUNITY IS NOT A WITHDRAWAL OF THE HEARING REQUEST

In ***Taylor v. Rhode Island Dept. of Environmental Management***, ARB No. 04-166, ALJ No. 2001-SWD-1 (ARB Nov. 29, 2004), the federal decisions in *Rhode Island Dep't of Envtl. Mgmt. v. United States*, 304 F.3d 31 (1st Cir. 2002), and *Rhode Island v. United States*, 301 F. Supp. 2d 151 (D. R.I. 2004), had enjoined, based on state sovereign immunity, the Department of Labor's adjudication of the complaint, as well as three others initiated and pursued by the Rhode Island Department of Environmental Management employees. The ALJ had dismissed the complaint on sovereign immunity grounds, and the Complainant petitioned for ARB review arguing that the Respondent's request for an ALJ hearing was a waiver of sovereign immunity, citing in support *Lapides v. Board of Regents of the Univ. Sys. of Ga.*, 535 U.S. 613 (2002). The Complainant alternatively argued that the Respondent's raising of the sovereign immunity defense before the ALJ should be treated as a withdrawal of the Respondent's request for hearing resulting in the reinstatement of OSHA's determination of the final determination of the Secretary.

The Board found that the Respondent's request for an ALJ hearing was not a waiver of immunity. The Board observed that the federal court decisions did not bar investigation at the OSHA level and that Secretarial intervention at the ALJ level would defeat the immunity bar. Thus, "[r]egardless of who requests the hearing, elevation of the complaint from the investigatory level to the level where an administrative law judge will decide the case forces resolution of the sovereign immunity question, because the Secretarial intervention that can cure the sovereign immunity defect must occur 'at or before the ALJ stage.'" The ARB ruled that a "hearing before an administrative law judge must be permitted without requiring the State to yield the very immunity that it is seeking to assert."

In regard to the "withdrawal" argument, the Board held that the State did not withdraw before the ALJ, but rather prevailed, albeit on procedural grounds. The Board also rejected an argument that the federal courts' rulings supported reinstatement of the OSHA determination in her favor. The ARB stated that it was expressing no opinion as to how it might dispose of the sovereign immunity issues presented b the case if they arose in other circumstances or outside the First Circuit.

To the same effect ***Migliore v. Rhode Island Dept. of Environmental Management***, ARB No. 04-156, ALJ No. 2000-SWD-1 (ARB Nov. 30, 2004). *See also Migliore v. Rhode Island Dept. of Environmental Management*, 2000-SWD-1 (ALJ Sept. 8, 2004) (ALJ rejected argument that the state had withdrawn its request for an ALJ hearing, and therefore OSHA's $10,000 award remained in effect).

[Nuclear and Environmental Whistleblower Digest VIII I d and XX E]
INJUNCTION PREVENTING DOL FROM ADJUDICATING WHISTLEBLOWER CLAIM WITHOUT THE INTERVENTION OF THE SECRETARY BASED ON STATE SOVEREIGN IMMUNITY DEFENSE DOES NOT DEPRIVE ARB OF AUTHORITY TO CONSIDER ISSUES NOT DECIDED IN FEDERAL COURT DECISIONS

In ***Taylor v. Rhode Island Dept. of Environmental Management***, ARB No. 04-166, ALJ No. 2001-SWD-1 (ARB Nov. 29, 2004), the federal decisions in *Rhode Island Dep't of Envtl. Mgmt. v. United States*, 304 F.3d 31 (1st Cir. 2002), and *Rhode Island v. United States,* 301 F. Supp. 2d 151 (D. R.I. 2004), had enjoined, based on state sovereign immunity, the Department of Labor's adjudication of the complaint, as well as three others initiated and pursued by the Rhode Island Department of Environmental Management employees. The ALJ had dismissed the complaint on sovereign immunity grounds, and the Complainant petitioned for ARB review. Rhode Island argued that the Board had no authority to do anything but reject the Complainant's petition for review. The Board rejected this argument, finding that it had authority to consider arguments made by the Complainant that were based on developments in the processing of her complaint that the federal courts had not examined.

ERA CASES

[Nuclear and Environmental Whistleblower Digest II B 1 b]
FAILURE TO NAME INDIVIDUAL FEDERAL OFFICIALS; ALJ'S DISCRETION TO PERMIT AMENDMENT OF COMPLAINT

In ***Salsbury v. Edward Hines, Jr. Veterans Hospital***, 2004-ERA-7 (ALJ Oct. 18, 2004), the ALJ had determined that the APA waiver of sovereign immunity for non-monetary relief applied to a claim for reinstatement with back pay brought under the whistleblower provision of the ERA. In part, the ALJ's determination was based on the availability of equitable relief against a federal official in their official capacity, as opposed to relief against the agency itself. The Respondent presented as an alternative ground for dismissal that the Complainant had failed to name a "person" when filing his whistleblower complaint as required by section 5851(b)(1). The ALJ, however, held that under 29 C.F.R. § 18.5(e) he has the discretion to permit the Complainant to amend his petition to add named individuals personally, and since this imperfection with the complaint could be cured (assuming that no due process rights of the named individuals would be harmed) the Complainant's error (naming only the Dept. of Veteran's Affairs and the VA hospital) was not fatal.

[Nuclear and Environmental Whistleblower Digest VI B]
REQUEST FOR HEARING; FAILURE TO TIMELY SERVE OPPOSING PARTY

In ***Ponzi v. Williams Group International***, 2004-ERA-28 (ALJ Oct. 22, 2004), the ALJ recommended dismissal of the Respondent's request for hearing where the Respondent, which was represented by counsel, failed to serve the Complainant with timely notice of its request for hearing. The regulation at 29 C.F.R. § 24.4(c)(3) provides that a party requesting a hearing shall "on the same day" send a copy of request to the other party. The ALJ found that this was not a mere perfunctory requirement, as it provides notice that the OSHA determination is being challenged

and opportunity for the other party to also request a hearing. The ALJ found no evidence that the ARB had ruled on the issue, but that three other ALJs have held that failure of a party in an ERA case to timely serve the other party with a request for a hearing deprives OALJ of jurisdiction to hear and decide the merits of the case. *Webb v. Numanco, LLC*, 1998-ERA-27 and 28 (ALJ July 17, 1998); *Cruver v. Burns International*, 2001-ERA-31 (ALJ Dec. 5, 2001); *Steffenhagen v. Securitas, AB*, 2005-ERA-3 (ALJ Dec. 16, 2003); *Shirani v. Calvert Nuclear Power Plant, Inc.*, 2004-ERA09 (ALJ Apr. 29, 2004). *Compare Hibler v. Exelon Nuclear Generating Co.*, 2003-ERA-9 (ALJ May 5, 2003) (no jurisdictional impediment where failure was by a pro se party).

[Nuclear and Environmental Whistleblower Digest VI E]
TIMELINESS OF REQUEST FOR HEARING; FILING BY REGULAR MAIL COUPLED WITH MIS-ADDRESSED ENVELOPE DO NOT ESTABLISH GROUNDS FOR EQUITABLE TOLLING

In ***Salsbury v. Edward Hines, Jr. Veterans Hospital***, 2004-ERA-7 (ALJ Oct. 18, 2004), the Complainant mailed his request for hearing on the fourth day following receipt of the OSHA determination letter by regular mail. He put the wrong address on the envelope and the mail was returned. Two days after receipt of the returned mail he re-sent the hearing request (almost a month and a half after receiving the determination letter). The ALJ found that equitable tolling did not apply as the Complaint did not have "clean hands." He failed to comply with the regulatory directive to file a hearing request by fax, telegraph, or next-day mail, and waited until the fourth day to file by regular mail -- and then to the wrong address. The ALJ noted that if the Complainant had followed the regulatory requirement he would have learned about the mistake in the address much sooner.

[Nuclear and Environmental Whistleblower Digest VII B 1]
SUBPOENAS; REQUEST FOR SUBPOENAS WHILE CASE PENDING BEFORE THE ARB

In ***Reid v. Constellation Energy Group, Inc.***, ARB No. 04-107, ALJ No. 2004-ERA-8 (ARB Oct. 13, 2004), ***Halpern v. XL Capital, Ltd.***, ARB No. 04-120, ALJ No. 2004-SOX-54 (ARB Oct. 13, 2004) and ***Cummings v. USA Truck, Inc.***, ARB No. 04-043, ALJ No. 2003-STA-47 (ARB Sept. 15, 2004), the ARB denied the requests of pro se complainants to obtain subpoenas from the ARB. The Board observed in each case that the Board acts in an appellate capacity and its decision is based only on evidence considered by the ALJ in the initial hearing.

[Nuclear and Environmental Whistleblower Digest IX B 2]
UNTIMELY APPEAL; FAILURE TO RESPOND TO ARB'S ORDER TO SHOW CAUSE

In ***Reid v. Niagara Mohawk Power Corp.***, ARB No. 04-181, ALJ No. 2000-ERA-23 (ARB Dec. 8, 2004), the Complainant faxed a petition for review to the ARB one day late. The ARB issued an Order to Show Cause giving the Complainant the opportunity to show that the case falls within one of the three recognized grounds for accepting untimely-filed petitions (defendant mislead plaintiff; extraordinary circumstances, precise claim in wrong forum) or some additional appropriate reason.

The Complainant, however, did not respond to the Order to Show Cause, and the Board dismissed the appeal.

[Nuclear and Environmental Whistleblower Digest IX D 3]
MOTION FOR RECONSIDERATION BY ALJ; AUTHORITY; TIME LIMITS

In ***Hannum v. Fluor Hanford, Inc.***, 2003-ERA-25 (ALJ Apr. 30, 2004), the ALJ concluded that he did not have the authority to reconsider because he no longer had jurisdiction over the matter once he issued the recommended decision and order (albeit acknowledging in a footnote that there may be authority to correct clerical errors or judgments which had been issued due to inadvertence or mistake).

[Nuclear and Environmental Whistleblower Digest IX M]
DISMISSAL BEFORE THE BOARD; COMPLAINANT'S REQUEST THAT THE CASE BE DISMISSED WITHOUT PREJUDICE RATHER THAN DECIDED ON THE ISSUE ON WHICH THE ALJ RECOMMENDED DISMISSAL

In ***Reid v. Niagara Mohawk Power Corp.***, ARB No. 03-154, ALJ No. 2003-ERA-17 (ARB Oct. 19, 2004), the Complainant requested that the ARB dismiss his appeal without prejudice because his family had incurred great expense in litigating the case. The Board noted that neither the ERA nor the implementing regulations provide for dismissal without prejudice of a complaint pending before the Board, and that even if such a dismissal might be appropriate in some cases, under the facts of this case dismissal without prejudice would not be proper. The Board rejected the financial burden argument because all that remained before the Board is to issue a decision, because the Respondent had also expended resources in litigating this case and it would not be fair to deny it a final resolution or to expose it to additional legal costs should the Complainant attempt to reopen the litigation. The Board, therefore proceeded to consider the substantive issue in the case -- whether the Complainant's request for an ALJ hearing was timely.

[Nuclear and Environmental Whistleblower Digest IX M 2]
CLAIM OF INEFFECTIVE ASSISTANCE OF COUNSEL; CLIENTS ARE HELD ACCOUNTABLE FOR THE ACTS AND OMISSIONS OF THEIR COUNSEL

In ***Reid v. Niagara Mohawk Power Corp.***, ARB No. 03-154, ALJ No. 2003-ERA-17 (ARB Oct. 19, 2004), the Complainant's attorney had failed to respond to the ALJ's order to show cause why the case should not be dismissed based on an untimely request for an ALJ hearing. The Complainant's attorney also failed to respond to the Respondent's motion to dismiss based on the Complainant's failure to respond to the ALJ's order to show cause. The attorney stated that she had mistakenly believed that the order to show cause related to another of the Complainant's pending cases, that the ALJ had already issued a ruling on that issue, and therefore the Respondent motion to dismiss was mistaken as the ALJ had already ruled. The attorney informed the Board that she did not have time to research the issue for appeal as she was about to undergo a medical procedure, and appealed to the "interests of justice." The Complainant filed a *pro se* brief requesting a remand for hearing based, *inter alia*, on ineffective assistance of counsel. The Respondent noted that when the request for hearing was made, the Complainant was not yet represented by counsel.

The Board rejected the ineffective assistance of counsel argument, observing that while the Complainant was not personally responsible for his counsel's failure to respond to the ALJ's Order to Show Cause, he is held accountable for the acts and omissions of his attorney, and that if his attorney's conduct fell substantially below what is reasonable under the circumstances, his remedy is against the attorney in a malpractice suit.

[Nuclear and Environmental Whistleblower Digest XIX]
COMPLAINANT'S DELIBERATE VIOLATION OF ERA PRECLUDES LITIGATION OF HIS ERA WHISTLEBLOWER CLAIM

In ***Hibler v. Exelon Generating Co., LLC***, 2003-ERA-9 (ALJ Dec. 15, 2004), the Respondent's closing brief asserted that the Complainant was precluded from pursuing his claim because he deliberately engaged in a violation of regulatory requirements by knowingly falsifying weld inspection records, presenting in support of this assertion an NRC Report. The ALJ agreed with the Respondent's contention, finding that the Complainant was ineligible for the whistleblower protections of the ERA because the preponderance of the evidence showed that he deliberately caused a violation of the Act and/or the Atomic Energy Act. *See* 42 U.S.C. 5851(g); 29 C.F.R. § 24.9; *Fields v. Florida Power Corp.*, 1996-ERA-22, n.3 (ARB Mar. 13, 1998); *James v. Ketchikan Pulp Co.*, Case No. 1994-WPC-4 (Sec'y Mar. 15, 1996), slip op. at 6. The ALJ therefore made no findings regarding the merits of the claim, and recommended that the ARB dismiss the complaint.

In making this finding, the ALJ observed that it was the Respondent's burden to establish section 5851(g) ineligibility by a preponderance of the evidence. The ALJ found that the three relevant questions were:

(1) *Did the Complainant violate the ERA or the Atomic Energy Act*? The evidence of record and the NRC's report established this element.

(2) *Did the Complainant do so deliberately*? The ALJ cited ARB authority to the effect that the Respondent must show that the complainant acted with knowledge or with reckless disregard of whether his or her act would cause a violation. *Fields, supra*. The ALJ conceded that this was a difficult determination to make, but after thoroughly reviewing the testimony and documentary evidence from the hearing was convinced that a preponderance of the evidence showed that the Complainant knowingly falsified weld records in a deliberate violation of federal law.

(3) *Did the Respondent or any agent thereof direct the Complainant to commit the violation*? Although there was evidence that the Respondent forcefully directed the Complaint to *perform* the inspections, there was no evidence that the Respondent directed the Complainant to falsify inspection records.

[Nuclear and Environmental Whistleblower Digest XX E]
SOVEREIGN IMMUNITY AND APA SECTION 702 WAIVER FOR NON-MONETARY RELIEF; SOVEREIGN IMMUNITY APPLIES TO COMPENSATORY DAMAGES BUT NOT TO REINSTATEMENT WITH BACK PAY

In ***Salsbury v. Edward Hines, Jr. Veterans Hospital***, 2004-ERA-7 (ALJ Oct. 18, 2004), the ALJ addressed whether the waiver of federal sovereign immunity for non-

monetary relief found in the Administrative Procedure Act at 5 U.S.C.A. § 702 applies to ERA whistleblower adjudications. The ALJ reviewed relevant federal court authority to the effect that section 702 provides a waiver of sovereign immunity for suits against the United States in regard to specific relief, as opposed to money damages. The ALJ observed that the ARB's decision in *Pastor v. Dept. of Veterans Affairs*, ARB No. 99-071, ALJ No. 1999-ERA-11 (ARB May 30, 2003), finding that sovereign immunity was not waived under section 5851 of the ERA, was carefully drafted to limit its ruling to compensatory damages. The ALJ found that section 702 applies to ERA whistleblower adjudications. He also found that the *Pastor* "person" analysis also must be read to permit injunctive relief ordered against a federal officer of an agency (as opposed to the agency itself).

The ALJ next considered whether a claim for reinstatement with back pay under the ERA whistleblower provision is a claim for "money damages" or is equitable relief. Noting that federal case law was not dispositive on this issue, the ALJ looked to the language of the ERA and implementing regulations and concluded that they indicated that "back pay is considered separate from, and not a subset of, compensatory damages." Slip op. at 10. Based on statutory construction and settled principles offered by the U.S. Supreme Court regarding sovereign immunity, the ALJ concluded that "Congress intended reinstatement with back pay to be equitable relief and not money damages under the APA and the ERA. Therefore the Administrative Procedure Act applies to waive sovereign immunity as to this aspect of Claimant's action." Slip op. at 10. The ALJ, however, found that sovereign immunity applied to bar the Complainant's request for compensatory damages.

The Respondent had also argued that the Complainant was not entitled to appointment to a position to which he had applied, as the ERA refers to "employees" and not "applicants." The Complainant had evidently left his employment with the VA, and was re-applying. The Respondent contended that to hire to a position never held would be a reparation rather than equitable relief. The ALJ agreed.

The Respondent observed that the APA conditions the waiver of sovereign immunity on an alternative judicial remedy not being available, 5 U.S.C. § 704, and argued that the Whistleblower Protection Act and the Back Pay Act were such alternative remedies. The ALJ, however, found that the WPA did not provide the equitable relief available under the ERA, that the BPA was not applicable to the facts of the case, and that the BPA did not provide equitable relief from future harassment as is available under the ERA. The ALJ, therefore, found that neither the WPA nor the BPA negated the APA's waiver of sovereign immunity.

SOX CASES

REQUEST FOR HEARING

REQUEST FOR HEARING; FAILURE TO TIMELY SERVE OPPOSING PARTY

In ***Richards v. Lexmark International, Inc.***, 2004-SOX-49 (ALJ Oct. 1, 2004), the Complainant failed to timely serve a copy of his objections to the OSHA determination letter and request for an ALJ hearing on the Respondent or the Respondent's attorney. The Respondent moved for summary decision based on this

failure. In response, the Complainant asserted that OSHA's determination letter did not inform him of this requirement and that the Respondent was not prejudiced by the oversight. The ALJ noted that individual ALJs have disagreed over whether failure to comply with requirements to serve the respondent with a copy of a hearing request constitutes grounds for dismissal of the complaint, but found that regardless of how the issue is framed, the pertinent inquiry is whether the respondent was prejudiced by the improper service. In the instant case, the ALJ found that the Respondent had not been prejudiced and therefore denied the motion for dismissal of the complaint.

TIMELINESS OF REQUEST FOR HEARING; DATE OF RECEIPT OF OSHA DETERMINATION BY THE COMPLAINANT

In ***Richards v. Lexmark International, Inc.***, 2004-SOX-49 (ALJ Oct. 1, 2004), OSHA had mailed its determination letter by certified mail to the Complainant's last known address, and the Postal Service had forwarded the letter to a forwarding address and made several attempts at delivery, leaving notices each time. The Complainant did not pick up the letter. OSHA did not send a copy of the letter to the Complainant's attorney. Complainant and his attorney thereafter asserted that they did not learn of the OSHA determination letter until a deposition several months later. The request for an ALJ hearing was made several days after the deposition. Before the ALJ, the Respondent moved for summary decision based on an untimely hearing request. The ALJ, however, found that the hearing request was timely, observing that the Sarbanes Oxley Act regulations set the trigger date for the time period for requesting an ALJ hearing as "receipt" of the OSHA determination letter rather than actual or constructive notice. The Respondent cited *Graham-Humphreys v. Memphis Brooks Museum of Art, Inc.*, 209 F.3d 552, 554 (6th Cir. 2000), a Title VII case, as support for its motion. In *Graham-Humphreys*, a similar "receipt" regulation was at issue, and the court held that there was presumptive receipt of the EEOC's right to sue letter within 5 days of mailing, and constructive receipt of notice of the letter when the Postal Service placed it in the complainant's mailbox. The ALJ, however, found that in the case before her the Complainant rebutted any presumption of receipt because he had denied such receipt and there was no evidence in the record that he had actually received it (the ALJ viewing all evidence and drawing reasonable inferences in the light most favorable to the Complainant under the summary decision standard). The ALJ distinguished the *Graham-Humphreys* finding of constructive receipt because in that case the complainant was expecting to receive the right to sue letter in the mail and had received the Postal Service notice of attempted delivery but failed to take action to receive delivery. In the instant case, in contrast, neither the Complainant nor his attorney had reason to suspect that they would be receiving a letter from OSHA at that particular time and there was no evidence in the record of physical receipt of the Postal Service notice.

[Editor's note: Compare ***Robinson v. Northwest Airlines, Inc.***, 2004-AIR-37 (ALJ Oct. 28, 2004), decided under similar AIR21 regulations, in which the ALJ concluded that receipt meant date of delivery of the OSHA determination letter by certified mail to the last known address of the complainant].

TIMELINESS OF COMPLAINT

TIMELINESS OF COMPLAINT; DATE EMPLOYEE MADE AWARE OF DECISION TO TERMINATE IS TRIGGER DATE EVEN IF POSSIBLE THAT TERMINATION COULD BE AVOIDED

In ***Lawrence v. AT&T Labs***, 2004-SOX-65 (ALJ Sept. 9, 2004), the ALJ found that the Complainant's SOX complaint was not timely filed. The Complainant had received a letter informing her that she had been selected for involuntary termination unless she was placed in another position with the Respondent by a date certain. Although additional correspondence subsequently followed between the Complainant or her attorney and the Respondent, the ALJ found that nothing happened after the original letter that would have been a reasonable basis for the Complainant to believe that the Respondent had withdrawn or altered its determination to discharge her. The ALJ wrote:

> The fact that Complainant could have avoided termination if she found another job with Respondent does not prevent the statute of limitations from running. The statute of limitations begins to run when the employee is made aware of the employer's decision to terminate him or her even when there is a possibility that the termination could be avoided. *English v. Whitfield*, 858 F.2d 957 (4th Cir. 1988); *Electrical Workers v. Robbins & Myers, Inc.*, 429 U.S. 229 (1976) (cited by *Ricks*, 449 U.S. at 261).

PROCEDURE BEFORE ARB

SUBPOENAS; REQUEST FOR SUBPOENAS WHILE CASE PENDING BEFORE THE ARB

In ***Reid v. Constellation Energy Group, Inc.***, ARB No. 04-107, ALJ No. 2004-ERA-8 (ARB Oct. 13, 2004), ***Halpern v. XL Capital, Ltd.***, ARB No. 04-120, ALJ No. 2004-SOX-54 (ARB Oct. 13, 2004) and ***Cummings v. USA Truck, Inc.***, ARB No. 04-043, ALJ No. 2003-STA-47 (ARB Sept. 15, 2004), the ARB denied the requests of pro se complainants to obtain subpoenas from the ARB. The Board observed in each case that the Board acts in an appellate capacity and its decision is based only on evidence considered by the ALJ in the initial hearing.

PROCEDURE BEFORE OALJ/GENERALLY

PLEADING REQUIRMENTS; DISORGANIZED AND INDEFINITE COMPLAINT; COURT WILL NOT WASTE ITS TIME SEARCHING FOR THE LEGAL THEORY OF THE COMPLAINANT

In ***Stone v. Duke Energy Corp.***, No. 3:03-CV-256 (W.D.N.C. Feb. 11, 2004), the court dismissed the Plaintiff's Sarbanes-Oxley Act whistleblower complaint for failure to contain "a short and plain statement of the claim" as required by FRCP 8 and

failure to present claims in separate counts for clear presentation of the matters set forth as required by FRCP 10. The court wrote that it would "not waste its time searching through Plaintiff's disorganized and indefinite Complaint for a prima facie case. *See, e.g., Cass v. Richard Joshua Tobacco Co., Inc.,* 1998-WL-834856, *2 (M.D.N.C. 1998) ('The Complaint . . . is a rambling fount of senseless writing . . . . [which] lacks sufficient factual allegations for the court to wade through the ramblings in search of a possible legal theory.')."

MOTION TO RECONSIDER BEFORE ALJ; AUTHORITY OF ALJ TO CONSIDER

In ***Steffenhagen v. Securitas Sverige, AR***, 2003-SOX-24 (ALJ Aug. 13, 2004), the ALJ found that she did not have jurisdiction to rule on a motion to reconsider when the Complainant also filed on the same day an appeal to the ARB.

COVERED EMPLOYEE

COVERED EMPLOYEE; ALL WORK PERFORMED OUTSIDE THE UNITED STATES

In ***Concone v. Capital One Financial Corp.***, 2005-SOX-6 (ALJ Dec. 3, 2004), the ALJ ruled that a foreign national whose entire employment was outside the United States was not a covered "employee" under the whistleblower provision of the Sarbanes-Oxley Act. Noting that the drafters of the regulations were intentionally silent as to this issue, the ALJ agreed with the Respondent's contention that, because Congress did not explicitly make the whistleblower provision at § 806 apply extraterritorially, but did expressly make the criminal provision at § 1107 extraterritorial in reach, Congress revealed a clear intention not to extend the protection of § 806 to persons who were employed wholly outside the U.S. In a footnote, the ALJ, noted that the similar ruling in *Carnero v. Boston Scientific*, Civ. No. 04-10031-RWZ, 2004WL1922132 (D. Mass. Aug. 27, 2004), did not turn on the fact that the complainant was a foreign national, but on the fact that he worked outside the U.S. (implying thereby that the ALJ's decision, likewise, did not turn on the citizenship status of the employee). The ALJ also observed that there appeared to be no reason why the Act should not protect foreign nationals who work in the U.S.

BURDEN OF PROOF AND PRODUCTION
ADVERSE EMPLOYMENT ACTION

ADVERSE EMPLOYMENT ACTION; TANGIBLE JOB CONSEQUENCE ANALYSIS VIS-A-VIS TITLE VII INTERPRETATIVE LAW IN CIRCUIT IN WHICH CASE AROSE; UNDER AN EXPANSIVE DEFINITION, PLACEMENT ON A LAY-OFF LIST IS ADVERSE ACTION, BUT NON-SEVERE AND NON-PERVASIVE ACTIONS ARE NOT

In ***Hendrix v. American Airlines, Inc.***, 2004-AIR-10, 2004-SOX-23 (ALJ Dec. 9, 2003), the ALJ thoroughly analyzed discordant administrative decisions relative to the meaning of "adverse action" under various whistleblower laws, and specifically the concept of tangible job consequence. She concluded that, although Title VII decisions are not binding precedent for purposes of a whistleblower claim, they provide helpful guidance. The ALJ also concluded that she should look to the law of circuit in which the claim arises. Because the instant case alleging violations of both

the AIR21 and SOX whistleblower laws arose in the Tenth Circuit, she applied the expansive definition of adverse action found in *Hillig v. Rumsfeld*, 381 F.3d 1028 (10th Cir. 2004), in which the court held that the fact that unlawful personnel action turned out to be inconsequential goes to damages, not liability, although the standard does not encompass mere inconvenience or alteration of job responsibilities. In a footnote, the ALJ observed that the Sarbanes Oxley Act contains language, unlike other whistleblower laws, explicitly prohibiting threats and harassment -- acts which are not necessarily tangible and not ultimate employment actions.

Applying this standard, the ALJ found that the Complainant's placement on a lay-off list constitutes an adverse action, even though the Complainant suffered no tangible consequence as his name was removed before the lay-offs took effect. [Later in the decision, however, the ALJ found that there was no connection between protected activity and the placement on the lay-off list].

The Complainant also raised a hostile work environment claim. The ALJ initially parsed out which portions of the claim were timely raised. She found that claims of verbal abuse, assignment to a second shift, and denial of access to computer resources were timely raised. The ALJ, however, found these actions were not so severe and pervasive that they altered the terms of the Complainant's employment -- they were the kinds of inconvenience an employee should expect to endure in the normal workplace.

ADVERSE EMPLOYMENT ACTION; REFUSAL TO ACCEPT CERTIFIED MAIL SENT BY THE COMPLAINANT

In ***Harvey v. The Home Depot, Inc.***, 2004-SOX-77 (ALJ Nov. 24, 2004), the Complainant filed a complaint alleging that the Home Depot vice president for legal matters violated the employee protection provision of the Sarbanes Oxley Act by refusing to accept delivery of the Complainant's certified, restricted delivery, mail to the vice president, containing legal matters. The Complainant's theory was that by refusing to accept his legal correspondence, the vice president endangered the company's interests and failed in his fiduciary duties, thereby perpetrating a fraud on the company and shareholders. The ALJ found that the complaint failed to state a claim for which relief can be granted because the vice president's act did not adversely impact on the terms or conditions of the Complainant's former employment with the Respondent, nor on his ability to obtain subsequent employment. Although the Complainant attempted to link the mail refusal to a claim of blacklisting, the ALJ found that the act of refusing mail is not blacklisting.

BURDEN OF PROOF AND PRODUCTION
CAUSATION

PRIMA FACIE CASE; TEMPORAL PROXIMITY

In ***Heaney v. GBS Properties LLC***, 2004-SOX-72 (ALJ Dec. 2, 2004), the Complainant was a real estate agent. The ALJ found that Complainant's concerns over a condominium project allegedly built in violation of certain codes within the knowledge of the Respondent was arguably a bank fraud against mortgage lenders and may be protected activity under the Sarbanes Oxley Act. Nonetheless, the ALJ

found that the complaint did not arise to the level of a prima facie case because the Complainant's concerns about the project had been raised several years before his termination, and the Complainant had served in uninterrupted employment of the Respondent in the interim, even receiving awards. The ALJ found no temporal proximity between the Complainant's concerns and his termination, and no evidence, either direct or circumstantial, of retaliatory animus on the part of the Respondent and/or discrimination against the Complainant in violation of the Sarbanes Oxley Act.

RESPONDENT'S KNOWLEDGE OF PROTECTED ACTIVITY; IMPUTATION OF KNOWLEDGE BY EXECUTIVES WITH CONTROL OVER COMPLAINANT'S EMPLOYMENT WHERE IMMEDIATE SUPERVISORS KNEW ABOUT PROTECTED ACTIVITY

Where a complainant provides credible evidence that his immediate supervisors knew of his protected activity, this knowledge may be imputed to outside executives who had ultimate authority about the complainant's employment status. ***Henrich v. Ecolab, Inc.***, 2004-SOX-51 (ALJ Nov. 23, 2004) (finding that some of the Complainant's allegations of reporting violations to supervisors were not documented and not credible, but that one of his allegations that his immediate supervisors knew of his protected activity was credible and could be imputed to the executives who fired him; the Complainant, however, ultimately failed to establish a causal link between such knowledge and his termination from employment).

BURDEN OF PROOF AND PRODUCTION PROTECTED ACTIVITY

PROTECTED ACTIVITY; WORKPLACES DISPUTES; BANK FRAUD

In ***Heaney v. GBS Properties LLC***, 2004-SOX-72 (ALJ Dec. 2, 2004), the Complainant was a real estate agent. The ALJ held that Complainant's vocal concern over a purchaser's use of an unlicensed home inspector was not protected activity under the Sarbanes Oxley Act whistleblower provision (neither the Complainant nor the Respondent had anything to do with the choice of the inspector). Likewise, the ALJ held that the Respondent's refusal to intervene in a dispute between the Complainant and another agent was not protected activity. The ALJ,. however, found that the Complainant's concerns over a condominium project allegedly built in violation of certain codes within the knowledge of the Respondent was arguably a bank fraud against mortgage lenders and therefore protected activity under the Sarbanes Oxley Act.

PROTECTED ACTIVITY; PARTICIPATION IN INVESTIGATION OF ACTIVITY REASONABLY PERCEIVED TO BE FRAUD ON SHAREHOLDERS

In ***Hendrix v. American Airlines, Inc.***, 2004-AIR-10, 2004-SOX-23 (ALJ Dec. 9, 2003), the ALJ found that the Complainant engaged in protected activity under the Sarbanes Oxley Act when he participated in the investigation of an employee whom the Complainant reasonably believed was committing fraud against the Respondent and its shareholders by creating art objects for personal gain out of company material, on company time. The Respondent asserted that the Complainant was only a "witness" to a manager's protected activity because it was that other manager who reported the alleged fraudulent activity to upper management. The ALJ, however,

found that the Sarbanes Oxley Act protects an employee who provides information or *otherwise assists* in the investigation of fraudulent activity. The ALJ found that although the Complainant never identified a particular code section he believed had been violated, the Sarbanes Oxley Act merely requires that a complainant have a reasonable belief that he is blowing the whistle on fraud and protecting investors.

PROTECTED ACTIVITY; MATERIALITY STANDARD

In ***Henrich v. Ecolab, Inc.***, 2004-SOX-51 (ALJ Nov. 23, 2004), the Complainant raised issues relating to whether certain inventory was improperly accounted for as "good bulk" rather than "inventory at risk" thereby inflating the value of the inventory. The Respondent argued, *inter alia*, that the Complainant's alleged whistleblowing activity was immaterial to the company's accounting procedures because the inventory at issue had a relatively low value in terms of the company's overall revenue ($300,000 as compared to approximately $4 to 4.5 billion a year in sales) and auditing standards ($20 million materiality standard to trigger an outside audit). The ALJ found that OSHA had considered a materiality standard during notice and comment rulemaking, but found it inappropriate to "specify a percentage or formula for use in defining protected activity." 69 Fed. Reg. 163 (Aug. 24, 2004) (discussion of § 1980.102). The ALJ reviewed the case law precedent and found that it provides, albeit indirectly, the complainants do not need to meet a materiality requirement as to the extent of alleged SOX whistleblower violation. Rather, the standard is that a complainant must show a reasonable belief that a law had been violated and must plead specific incidents and material facts that give rise to the alleged violation.

DAMAGES AND OTHER REMEDIES

DAMAGES; *MCKENNON* AFTER-ACQUIRED EVIDENCE RULE NOT APPLICABLE TO MIXED MOTIVE CASE

In ***Platone v. Atlantic Coast Airlines Holdings, Inc.***, 2003-SOX-27 (ALJ July 13, 2004), the Respondent asserted that the Complainant was not entitled to any damages pursuant to *McKennon v. Nashville Banner Publishing Co.*, 513 U.S. 352 (1995). The ALJ found that *McKennon* was not applicable. In *Platone* the ALJ had found that the Respondent had mixed motives for dismissing the Complainant, and that the Respondent had failed to carry its burden to show by clear and convincing evidence that it would have suspended and terminated the Complainant on the legitimate, non-discriminatory ground alone. In *McKennon*, later discovered evidence established that the employer would have terminated the plaintiff's employment on the legitimate ground alone if the employer had known of it at the time the plaintiff was discharged.

DAMAGES; 401K PLAN; COMPLAINANT NOT YET ELIGIBLE WHEN FIRED

In ***Platone v. Atlantic Coast Airlines Holdings, Inc.***, 2003-SOX-27 (ALJ July 13, 2004), the Complainant had not yet worked long enough for the Employer to be eligible to participate in a 401K plan when she was fired. The ALJ declined to award damages for 401K participation had the Complainant stayed in the Respondent's employ because there was no way to know whether the Complainant would have

participated and, if so, how much she would have elected to have placed in the plan from her salary.

DAMAGES; FLIGHT BENEFITS

In ***Platone v. Atlantic Coast Airlines Holdings, Inc.***, 2003-SOX-27 (ALJ July 13, 2004), the Complainant asserted that her back pay award should include the value of free and discounted airline travel provided to Respondent's employees. The ALJ declined to make this award because of the difficulty of assigning value to the benefit, because there was no way to know how often the Complainant would have taken advantage of it, and because the benefit did not accrue under the Respondent's program.

ATTORNEY FEES

ATTORNEY FEES; SETTING MARKET RATE; USE OF ALTMAN WEIL SURVEY; FACTORS WEIGHED

In ***Platone v. Atlantic Coast Airlines Holdings, Inc.***, 2003-SOX-27 (ALJ July 13, 2004), the Complainant's attorney did not present any evidence on the prevailing market rate for the type of complex litigation done before the ALJ other than to state what the attorney's own fees are for such work. The ALJ, therefore, consulted the *2004 Altman Weil Survey of Law Firm Economics* for guidance. Taking into account that information, the lead attorney's experience, the complexity of the issues presented, and the excellent presentation at trial, the ALJ found that the hourly rates agreed to by the Complainant were well within the market rate and eminently reasonable. The ALJ took into account counsels' agreement to represent the Complainant at reduced rates to provide her with access to the legal system, but also found that the fee petition, which showed substantial time devoted to research and preparation for depositions, did not reflect an "expert" status in this particular practice area.

ATTORNEY'S FEES; PERCENTAGE REDUCTION WHERE BLOCK BILLING DID NOT PROVIDE AN ADEQUATE MEANS TO ACCESS REASONABLENESS OF TIME EXPENDED

In ***Platone v. Atlantic Coast Airlines Holdings, Inc.***, 2003-SOX-27 (ALJ July 13, 2004), the ALJ reduced the total hours billed by 15% where the Complainant's attorney used block billing that did not provide an adequate basis upon which to judge the reasonableness of all the time expended.

ATTORNEY'S FEES; USE OF MORE THAN ONE ATTORNEY

In ***Platone v. Atlantic Coast Airlines Holdings, Inc.***, 2003-SOX-27 (ALJ July 13, 2004), the Respondent argued that the fee petition should be disallowed where it did not indicate the distinct contribution of the Complainant's two attorneys, and where entries were allegedly duplicative and redundant. The ALJ, however, found that the petition reflected her own observations at trial -- that one attorney paid a lead role and the other a support role -- which is an efficient and cost-effective approach to litigation. The ALJ also noted that the Respondent had used two attorneys at depositions and at trial. Thus, with the exception of a few specific instances, the ALJ

declined to disallow any time on the ground that the Complainant unnecessarily used the services of more than one attorney.

STAA CASES

[STAA Whistleblower Digest II B 2 d]
TIMELINESS OF COMPLAINT; WRONG FORUM GROUND FOR EQUITABLE TOLLING IS NOT AVAILABLE IN STAA CASES

In ***Hillis v. Knochel Brothers, Inc.***, ARB Nos. 03-136, 04-081 and 04-148, ALJ No. 2002-STA-50 (ARB Oct. 19, 2004), the Complainant filed complaints with several state agencies alleging that the Respondent wrongfully terminated his employment. By the time he filed a complaint with OSHA, however, more than 180 days had transpired after his discharge. The ALJ found that the Complainant was entitled to equitable tolling under the "precise statutory claim in the wrong forum" principle stated in *School Dist. of Allentown v. Marshall*, 657 F.2d 16, 19-21 (3d Cir. 1981). Following a hearing on the merits, the ALJ found that the Complainant had been wrongfully discharged. The ARB reversed:

> Although this Board has been guided by *Allentown*, the STAA regulations cite filing with another agency as a circumstance not justifying equitable tolling:
>
> > [T]here are circumstances which will justify tolling of the 180-day period on the basis of recognized equitable principles or because of extenuating circumstances, e.g., where the employer has concealed or misled the employee regarding the grounds for discharge or other adverse action; or where the discrimination is in the nature of a continuing violation. The pendency of grievance-arbitration proceedings *or filing with another agency are examples of circumstances which do not justify a tolling of the 180-day period.*
>
> 29 C.F.R. § 1978.102(d)(3) (emphasis supplied). *See, e.g., Hoff v. Mid-States Express, Inc.*, ARB No. 03-051, ALJ No. 2002-STA-6 (ARB May 27, 2004). Thus, to the extent that a STAA complainant requests equitable tolling because he filed in the wrong forum, *Allentown* is inapplicable. The ALJ erred by relying on *Allentown* to proceed to a hearing on the merits of Hillis's complaint. R. D. & O. at 12-14.

[STAA Whistleblower Digest II H 4]
DISMISSAL FOR CAUSE; STANDARD OF REVIEW BY ARB

On reviewing an ALJ's dismissal of a STAA complaint made in accordance with FRCP Rule 41(b) for failure to prosecute or to comply with the federal rules or any order of the court, the ARB uses an abuse of discretion standard in contrast to the substantial evidence standard of review for an ALJ's factual determinations and de novo standard of review for ALJ's conclusions of law. ***Howick v. Campbell-Ewald Co.***,

ARB Nos. 03-156 and 04-065, ALJ Nos. 2003-STA-6 and 2004-STA-7 (ARB Nov. 30, 2004).

[STAA Whistleblower Digest II H 4 c]
REOPENING THE RECORD WHILE MATTER IS ON APPEAL TO THE ARB

The ARB disfavors reopening a closed record. When a party claims to have newly discovered evidence, guidance is found in FRCP 60(b), which provides for relief "from a final judgment, order, or proceeding" based upon "(2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial . . .." Fed. R. Civ. P. 60(b)(2). To prevail under this standard, a movant must show that:

> (1) the evidence was discovered after trial;
> (2) due diligence was exercised to discover the evidence;
> (3) the evidence is material and not merely cumulative or impeaching; and
> (4) the evidence is such that a new trial would probably produce a different result.

The discovery of impeachment material is not a sufficient basis for reopening the record. ***Hogquist v. Greyhound Lines, Inc.***, ARB No. 03-152, ALJ No. 2003-STA-31 (ARB Nov. 30, 2004) (ARB refused to reopen the record where the Complainant failed to show that the evidence was not available at the time of trial; or he merely offered it for impeachment; or he did not persuade the Board that considering it would produce a disposition of the case that would favor the Complainant).

[STAA Whistleblower Digest II H 5 a]
REMAND WHERE ARB REQUESTS AN OPPORTUNITY TO RECONSIDER ITS DECISION

In ***Roadway Express, Inc. v. Administrative Review Board, USDOL***, Nos. 03-4074 and 03-4115 (6th Cir. Nov. 22, 2004) (unpublished) (case below *Eash v. Roadway Express, Inc.*, ARB Nos. 02-008 and 02-064, ALJ No. 2000-STA-47), the ARB had affirmed without discussion the ALJ's granting of summary judgment to the Respondent on the issue of fatigue where the ALJ found that that the Complainant had become fatigued though no fault of the Employer. On review before the Sixth Circuit, the ARB moved for remand because it had failed to address an earlier case also involving the Complainant in which it had reversed an ALJ's grant of summary judgment in favor of the Respondent and held that a genuine issue of material fact is raised at the summary judgment stage where the Complainant disputes whether he deliberately made himself unavailable for work due to fatigue. The court granted the ARB's motion following precedent to the effect that an agency should be allowed to reconsider its own decision if it has doubts about the correctness of that decision. The court denied the Complainant's suggestion that the case be remanded directly to the ALJ because to do so would implicitly make a finding on the appropriateness of summary judgment in the case -- the very issue which the ARB sought to reconsider.

[STAA Whistleblower Digest II J]
REQUEST FOR HEARING; FAILURE TO TIMELY SERVE OPPOSING PARTY

In ***Daigle v. United Parcel Service***, 2004-STA-42 (ALJ Nov. 30, 2004), the ALJ declined to dismiss a STAA whistleblower complaint based on the Complainant's failure to timely serve the Respondent with a copy of his request for a hearing. The ALJ rejected the Respondent's suggestion that the ALJ follow her own decision in *Steffenhagen v. Securitas, AB*, 2005-ERA-3 (ALJ Dec. 16, 2003), finding that it was distinguishable on several grounds. First, *Steffenhagen* was governed by the ERA whistleblower regulations, which require service on the opposing party, whereas the STAA regulations do not impose such a requirement. Second, in *Steffenhagen* the Complainant was represented by counsel and had not provided OSHA with sufficient evidence to serve 17 named respondents with notice of the investigation. OSHA dismissed on these grounds, and the Complainant did not correct the failure of notice before the ALJ. In the instant case, in contrast, the Respondent was involved in the OSHA investigation, and the failure to serve the Respondent with a notice of request for a hearing did not prejudice the Respondent, particularly in view of the fact that the ALJ's notice of hearing was issued five days after the docketing of the appeal with OALJ.

[STAA Whistleblower Digest II K]
SUBPOENAS; REQUEST FOR SUBPOENAS WHILE CASE PENDING BEFORE THE ARB

In ***Reid v. Constellation Energy Group, Inc.***, ARB No. 04-107, ALJ No. 2004-ERA-8 (ARB Oct. 13, 2004), ***Halpern v. XL Capital, Ltd.***, ARB No. 04-120, ALJ No. 2004-SOX-54 (ARB Oct. 13, 2004) and ***Cummings v. USA Truck, Inc.***, ARB No. 04-043, ALJ No. 2003-STA-47 (ARB Sept. 15, 2004), the ARB denied the requests of pro se complainants to obtain subpoenas from the ARB. The Board observed in each case that the Board acts in an appellate capacity and its decision is based only on evidence considered by the ALJ in the initial hearing.

[STAA Whistleblower Digest II L]
BANKRUPTCY; AUTOMATIC STAY DOES NOT APPLY TO SUITS BROUGHT BY THE DEBTOR -- THUS COMPLAINANT'S BANKRUPTCY PETITION WOULD NOT STAY AN STAA WHISTLEBLOWER PROCEEDING

In ***Bettner v. Crete Carrier Corp.***, 2004-STA-18 (ALJ Oct. 1, 2004), the Complainant had filed a voluntary petition in bankruptcy. Earlier, the Complainant had filed a STAA whistleblower complaint. The ALJ held that the automatic stay provision of the Bankruptcy Act does not apply to suits by the debtor in the Seventh Circuit, and therefore the STAA proceeding would proceed.

[STAA Whistleblower Digest II M]
ATTORNEY SUSPENSION BEFORE OALJ AND ARB; RECIPROCAL EFFECT GIVEN TO STATE SUSPENSION

In ***In re Slavin***, ARB No. 04-172 (ARB Oct. 20, 2004), the ARB issued a Final Order Suspending Attorney From Practice Before the Administrative Review Board giving thereby reciprocal effect to a suspension order issued by the Tennessee Supreme Court on August 27, 2004. *Board of Professional Responsibility of Supreme Court of*

Tennessee v. Slavin, 145 S.W.3d 538 (Tenn. Aug 27, 2004) (No. M2003-00845-SC-R3-BP). Both the Tennessee Supreme Court and the U.S. Supreme Court denied stays of the Tennessee suspension order. *See Slavin v. Bd. of Professional Responsibility of the S. Ct. of Tennessee*, No. 04A260 (U.S. Oct. 4, 2004). In ***In re Slavin***, 2004-MIS-5 (ALJ Sept. 28, 2004), the Chief ALJ similarly suspended the attorney from practice before the Office of Administrative Law Judges based on reciprocal application of the Tennessee Supreme Court order suspending Slavin. Similar to the procedure before the ARB, the Chief ALJ had issued a Order to Show Cause, and found that "Mr. Slavin's response to the Order to Show Cause does not establish that the Tennessee proceedings were in violation of due process, were lacking in proof of misconduct, or that a grave injustice would result in giving effect to the Tennessee Supreme Court's judgment. *See Selling v. Radford*, 243 U.S. 46, 50-51 (1917)."

[STAA Whistleblower Digest II M]
ATTORNEY SUSPENSION FROM PRACTICE; IMPACT ON FILINGS MADE PRIOR TO SUSPENSION

In ***Howick v. Campbell-Ewald Co.***, ARB Nos. 03-156 and 04-065, ALJ Nos. 2003-STA-6 and 2004-STA-7 (ARB Nov. 30, 2004), the ARB considered filings made by the Complainant's attorney that predated that attorney's suspension from practice before the Board.

[STAA Whistleblower Digest II V]
CONSOLIDATION OF APPEALS; SUBSTANIAL IDENTITY OF ISSUES AND COMMONALITY OF ISSUES; ADMINISTRATIVE ECONOMY

Where there was a substantial identity of the legal issues and the commonality of much of the evidence presented in two appeals before the ARB, the Board consolidated the matters for decision in the interest of judicial and administrative economy. ***Howick v. Campbell-Ewald Co.***, ARB Nos. 03-156 and 04-065, ALJ Nos. 2003-STA-6 and 2004-STA-7 (ARB Nov. 30, 2004).

[STAA Whistleblower Digest II W]
CHOICE OF LAW; COMPLAINANT'S RESIDENCE, EMPLOYER'S BUSINESS LOCATION, PLACE WHERE ADVERSE EMPLOYMENT ACTION OCCURRED

In ***Howick v. Campbell-Ewald Co.***, ARB Nos. 03-156 and 04-065, ALJ Nos. 2003-STA-6 and 2004-STA-7 (ARB Nov. 30, 2004), the ARB looked to both Sixth and Tenth Circuit law in reviewing an ALJ's recommendation to dismiss the complaint based on the Complainant and Complainant's attorney's failure to comply with the ALJ's orders. The Complainant resided in Ohio and the Employer was located in Michigan, both of which fall within the jurisdiction of the Sixth Circuit, while the Complainant's termination from employment occurred in Kansas, which is located within the jurisdiction of the Tenth Circuit.

[STAA Whistleblower Digest IV A]
FAILURE TO ESTABLISH A PRIMA FACIE CASE AT HEARING

In ***Smith v. Sysco Foods of Baltimore***, ARB No. 03-134, ALJ No. 2003-STA-32 (ARB Oct. 19, 2004), the Complainant put on a case that was based on the

Respondent's policy of assessing its employees penalty points for coming to work late. The Respondent then moved to dismiss the complaint because the Complainant had not presented any evidence that he had engaged in protected activity and therefore had not presented a prima facie case of discrimination. The ALJ granted the motion because he found that the Complainant provided no evidence that he either filed a complaint related to vehicle safety or that he refused to operate a vehicle. The ARB affirmed, noting that although the Complainant was pro se, "the burden of first establishing, and ultimately proving, the necessary elements of a whistleblower claim is no less for pro se litigants than it is for litigants represented by counsel."

[STAA Whistleblower Digest IV B 2 e]
LEGITIMATE, NONDISCRIMINATORY REASON FOR ADVERSE ACTION; COMPLAINANT'S COMPLAINT UNREASONABLE AND PRESENTED IN AN ARGUMENTATIVE, CONFRONTATIONAL STYLE

Where the Complainant presented in an argumentative and confrontational manner the unreasonable contention that a road construction company was overloading his truck, the Respondent presented legitimate, nondiscriminatory reason for requesting that the Complainant not be sent back to its construction project. Where the Complainant did not establish by a preponderance of the evidence that this reason was pretextual, he did not prove discrimination under the STAA whistleblower provision. ***Feltner v. Century Trucking, Ltd.***, ARB No. 03-118, ALJ Nos. 2003-STA-1 and 2 (ARB Oct. 27, 2004).

[STAA Whistleblower Digest V A]
PROTECTED ACTIVITY; MANNER OF RAISING COMPLAINT; COMPLAINANT MAY BE DISCIPLINED FOR NOT FOLLOWING PROCEDURE

In ***Harrison v. Administrative Review Board***, __ F.3d __, No, 03-4428 (2d Cir. Nov. 30, 2004) (case below ARB No. 00-048, ALJ No. 1999-STA-37), the Respondent had a procedure where if a yard switcher observed serious safety defects regarding a trailer, he could "red tag" the defective equipment. Under the Respondent's procedure, however, the switcher was required to obtain authorization from a supervisor before red tagging equipment. The Complainant was disciplined repeatedly for red tagging without authorization. The Second Circuit affirmed DOL's finding that the Complainant was not disciplined because he red tagged equipment, but because he did so without the authorization required under the Respondent's procedures. The court wrote: "The STAA prohibits employers from disciplining employees in retaliation for filing safety complaints; it also authorizes employees to refuse to drive unsafe vehicles. *See* 49 U.S.C. § 31105(a)(1). But it does not guarantee to employees the entitlement to use their own judgment to determine when to take equipment out of service. * * * An employee's entitlement to submit a complaint about a vehicle's safety would not mean that the employee was similarly entitled to attach the complaint to a rock and throw it through his supervisor's window. The employee's protected right to complain would not prevent Roadway from disciplining the employee for communicating his complaint by rock-throwing." (footnote omitted).

[STAA Whistleblower Digest V B 1 a]
PROTECTED ACTIVITY; COMMUNICATIONS TO COWORKERS; INTERNAL COMPLAINTS; LAW UNRESOLVED IN SECOND CIRCUIT

In ***Harrison v. Administrative Review Board***, __ F.3d __, No. 03-4428 (2d Cir. Nov. 30, 2004) (case below ARB No. 00-048, ALJ No. 1999-STA-37), the ARB had determined that the Complainant's red tagging of trailers for safety defects was not protected activity because the communicative function of such tagging was intended for coworkers rather than supervisors. The Second Circuit did not reach this issue because it affirmed the Board on other grounds. In a footnote it observed that it had never squarely addressed whether section 31105(a)(1)(A) covers internal complaints, and observed that while other circuits and DOL had found coverage for internal complaints, the Second Circuit had construed similar language in the FLSA as not protecting informal complaints to supervisors.

[STAA Whistleblower Digest V B 1 c i]
PROTECTED ACTIVITY; COMPANY POLICY ON RECORDING STOPS AS OFF-DUTY TIME

Where, under federal regulations, it was the employer's choice whether the driver should record stops made during the tour of duty as off duty time, so long as the driver was relieved of responsibility for the vehicle, the company could not be found to have required the Complainant to falsify his logs despite the Complainant's assertion to the contrary. Accordingly, the Complainant did not engage in protected activity when he refused to comply with company policy with regard to logging his time on the theory that the company's policy was for the purpose of avoiding federal limitations on driving time. ***Hogquist v. Greyhound Lines, Inc.***, ARB No. 03-152, ALJ No. 2003-STA-31 (ARB Nov. 30, 2004).

[STAA Whistleblower Digest VI B 4]
ADVERSE EMPLOYMENT ACTION; FILING OF MOTION TO PREVENT COMPLAINANT'S ATTORNEY FROM MAKING EX PARTE COMMUNICATIONS WITH OALJ

Following the hearing in which the ALJ ruled that he would recommend dismissal of the complaint based on the Complainant and Complainant's attorney's failure to comply with the ALJ's orders – but before the ALJ formalized that ruling in a written decision, the Complainant's attorney indicated in filings that he had visited the District Chief ALJ about the case. The District Chief ALJ had suggested that the Complainant's attorney file a motion to reconsider with the presiding ALJ. The Respondent thereafter filed a motion objecting to ex parte communications and requesting a "gag order" during the pendency of the Complainant's complaint before the ALJ. The Complainant then filed a complaint with OSHA alleging that the Respondent's motion constituted an adverse action pursuant to, and per se violation of, the whistleblower provisions under the STAA and TSCA. The Respondent shortly thereafter withdrew the "gag order" motion. Eventually a different ALJ granted summary judgment against the Complainant on the ground that the new complaint about the "gag order" motion did not establish a cause of action because Complainant failed to establish the existence of an adverse employment action. The ARB, noting that the Complainant had failed to allege and to adduce evidence in support of this essential element of his complaint, affirmed the ALJ's

recommendation of dismissal. ***Howick v. Campbell-Ewald Co.***, ARB Nos. 03-156 and 04-065, ALJ Nos. 2003-STA-6 and 2004-STA-7 (ARB Nov. 30, 2004).

[STAA Whistleblower Digest VII A 2]
COVERED EMPLOYEE; UPS DISTRICT SECURITY MANAGER

In ***Luckie v. United Parcel Service***, 2003-STA-39 (ALJ Dec. 2, 2004), one of the Complainant's duties was to be a UPS District Security Manager. In addition, unrefuted testimony showed that he handled damaged packages in performing security checks and resolving damage claims. The ALJ found that because the "Respondent is a company engaged in transporting of packages, both interstate and intrastate, while using commercial motor vehicles within the meaning of the STAA, and the Complainant played a role in accomplishing that mission in a safe and lawful manner in both his position as manager and an employee of that company" the Complainant was a covered employee under the whistleblower provision of the STAA. Slip op. at 11.

[STAA Whistleblower Digest VII A 2]
COVERED EMPLOYEE; INDEPENDENT CONTRACTOR

[STAA Whistleblower Digest VII B 1]
COVERED EMPLOYER; COMPANY WITH ABILITY TO CONTROL TERMS OF COMPLAINANT'S EMPLOYMENT

The STAA covers independent contractors, 49 U.S.C.A. § 31101(2); 29 C.F.R. § 1978.101(d). Where a company is not the Complainant's immediate employer, but it exercised control over his employment (*e.g.*, by requesting that the immediate employer not send the Complainant back to the job), such control is sufficient to establish STAA coverage. *See* ***Feltner v. Century Trucking, Ltd.***, ARB No. 03-118, ALJ Nos. 2003-STA-1 and 2 (ARB Oct. 27, 2004).

[STAA Whistleblower Digest VIII B]
COMMERCIAL MOTOR VEHICLE; YARD HORSES

In ***Harrison v. Administrative Review Board***, __ F.3d __, No, 03-4428 (2d Cir. Nov. 30, 2004) (case below ARB No. 00-048, ALJ No. 1999-STA-37), the Complainant operated a “yard horse,” which is a tractor used to maneuver trailers within the terminal, and was discharged after performing a yard horse inspection that his supervisor found to be unsafe and unauthorized. The Second Circuit affirmed the ALJ’s and ARB’s finding that yard horses are not “commercial motor vehicles” under the STAA’s statutory and regulatory definition, and therefore the Complainant was not engaged in protected activity relative to inspection of the yard horses. The yard horses were not used on the highways but at the Respondent’s facility which had at least one sign posted prohibiting unauthorized persons and private vehicles, and which was entirely enclosed by a chain link fence. The court was not convinced to the contrary by the Complainant’s argument that the yard horses were sometimes connected to trailers that are used on the highways.

[STAA Whistleblower Digest IX A 6]
REINSTATEMENT IS ORDERED EVEN IF COMPLAINANT DOES NOT SEEK IT WHERE THE RECORD DOES NOT CONTAIN SUBSTANTIAL EVIDENCE THAT REINSTATEMENT WOULD CAUSE IRREPARABLE ANIMOSITY

In ***Densieski v. La Corte Farm Equipment***, ARB No. 03-145, ALJ No. 2003-STA-30 (ARB Oct. 20, 2004), the Complainant testified that he was not looking for reinstatement. Nonetheless, the ARB ordered reinstatement where the record did not contain substantial evidence that the Complainant's reinstatement would cause irreparable animosity between the parties.

[STAA Whistleblower Digest IX B 1]
CIVIL RIGHTS TAX RELIEF; DEDUCTION FOR ATTORNEYS' FEES AND COSTS INCURRED BY INDIVIDUALS WHO PREVAIL IN EMPLOYMENT DISCRIMINATION CASES

The American Jobs Creation Act of 2004 includes a "civil rights tax relief" provision at Section 703, establishing a deduction from gross income for attorneys' fees and court costs incurred by, or on behalf of, individuals who prevail in employment discrimination and other enumerated types of cases. H.R. 4520, signed by the President on October 22, 2004.

[STAA Whistleblower Digest IX B 2 b iii]
BACK PAY; LIABILITY FOR DIFFERENCE BETWEEN PAY WITH RESPONDENT AND SUBSEQUENT EMPLOYER CONTINUES UNTIL REINSTATEMENT OR COMPLAINANT DECLINES REINSTATEMENT

In ***Densieski v. La Corte Farm Equipment***, ARB No. 03-145, ALJ No. 2003-STA-30 (ARB Oct. 20, 2004), the ALJ awarded back pay from the date of the Complainant's discharge to the date of his reemployment with another company, less the amount he received in unemployment insurance. The ARB adopted that ruling. In addition, the Complainant was entitled as part of the back pay award to the difference between his rate of pay with the Respondent and what he had earned with his subsequent employer. The ARB stated that this obligation would cease as of the date of reinstatement or the date the Complainant declined a good faith offer of reinstatement.

[STAA Whistleblower Digest X B]
ENFORCEMENT OF SETTLEMENT AGREEMENT WHERE COMPLAINANT DECLINES TO SIGN FINAL SETTLEMENT DOCUMENT, BUT WHERE HER ATTORNEY HAD AGREED TO THE SETTLEMENT AND HAD NOT CONDITIONED THAT AGREEMENT ON THE COMPLAINANT'S SIGNATURE

In ***Chao v. Alpine, Inc.***, No. 04-102-P-H (D.Me. Sept. 20, 2004), DOL had filed a complaint seeking to enforce backpay, interest and attorney fees awarded by the ARB in *Drew v. Alpine, Inc.*, ARB Nos. 02-044 and 02-079, ALJ No. 2001-STA-47 (ARB June 30, 2003). While pending before the District Court, the attorneys for the employee and the Defendant entered into a settlement agreement over the telephone, the Defendant sent a check to the employee's attorney to hold, and the employee's attorney sent a settlement agreement to the Defendant for signature and return for signing by the employee. Upon return, however, the employee refused to

sign. The check has not been returned to the Defendant. The Defendant then sought enforcement of the settlement by the District Court. The District Court granted enforcement weighing the factors listed in the Restatement (Second) of Contracts § 27, comment c., which provides "helpful indicia of intent when there is a question whether a written agreement is merely a memorial of an agreement already reached or itself the consummation of a negotiation...." (citation omitted). Among other factors, the court found that the employee was bound by the agreement of her counsel to the settlement, the counsel having not expressly conditioned the agreement on the employee's signature on the written agreement or even on the employee's acceptance of the terms of the agreement.

[STAA Whistleblower Digest XI A 1]
VOLUNTARY DISMISSALS; RECORD MUST BE AUTOMATICALLY FORWARDED TO THE ARB FOR REVIEW AND ISSUANCE OF A FINAL DECISION

In ***Ass't Sec'y & Boyd v. Palmentere Brothers Cartage Service, Inc.***, ARB No. 04-135, ALJ No. 2003-STA-40 (ARB Oct. 27, 2004), ***Foley v. J.B. Hunt Transportation, Inc.***, ARB No. 04-080, ALJ No. 2004-STA-14 (ARB Oct. 27, 2004) and ***Pavon v. United Parcel Service***, ARB No. 04-127, ALJ No. 2003-STA-46 (ARB Oct. 27, 2004), the complainants filed written notices of withdrawal and the ALJs dismissed the complaints pursuant to 29 C.F.R. § 1978.111(c). The ARB found that the ALJs' orders were subject to the automatic review provisions of 49 U.S.C.A. § 31105(b)(2)(C) and 29 C.F.R. § 1978.109(c)(1).

The ARB's holding that there is automatic review by the ARB of voluntary withdrawals before the ALJ in STAA cases appears to overrule the Secretary of Labor's holdings in *Shown v. Wilson Truck Corp.*, 1992-STA-6 (Sec'y Apr. 30, 1992) and *Creech v. Salem Carriers, Inc.*, 1988-STA-29 (Sec'y Sept. 27, 1988). In *Creech*, the Secretary held that where the ALJ enters an order allowing the complainant to withdraw objections to the Secretary's preliminary findings and order "the ALJ's order becomes the final administrative order in the case, and there is no need for review of the ALJ's order by the Secretary." In *Shown*, the Secretary in a footnote criticized the ALJ for not following the *Creech* procedure.

[STAA Whistleblower Digest XI B 1]
DISMISSAL FOR CAUSE; ABANDONMENT; RECORD MUST BE AUTOMATICALLY FORWARDED TO THE ARB FOR REVIEW AND ISSUANCE OF A FINAL DECISION

In ***Berna v. USF Dugan, Inc.***, ARB No. 04-121, ALJ No. 2003-STA-7 (ARB Oct. 27, 2004), the ALJ had issued an order to show cause why the complaint should not be dismissed on the ground of abandonment where the Complainant had not responded to the Respondent's discovery requests. The Complainant phoned the ALJ's office and stated that he wished to withdraw the case. Although requested to do so, he did not submit a written withdrawal. The ALJ, therefore, dismissed the case for abandonment.

The ARB determined that pursuant to 29 C.F.R. § 1978.109(a), the ALJ's decision and the record were to be forwarded immediately to the Administrative Review Board for automatic review and to issue a final decision. Pursuant to 29 C.F.R. §

1978.109(c)(1), the Board is required to issue a final decision and order based on the record and the decision and order of the ALJ.

After a delay in transmittal of the file, the Board issued a Notice of Docketing and Order to Show Cause, to which only the Respondent responded. The Board, therefore approved the ALJ's dismissal of the complaint.

[STAA Whistleblower Digest XI B 2]
DISMISSAL FOR CAUSE; FAILURE TO COMPLY WITH ALJ'S ORDERS

An ALJ may recommend dismissal of a complaint based upon a party's failure to comply with his order. Dismissal of a complaint for failure to comply with the ALJ's orders is a very severe penalty to be assessed in only the most extreme cases. Factors to be considered include:

(1) prejudice to the other party,
(2) the amount of interference with the judicial process,
(3) the culpability, willfulness, bad faith or fault of the litigant,
(4) whether the party was warned in advance that dismissal of the action could be a for failure to cooperate or noncompliance, and
(5) whether the efficacy of lesser sanctions were considered.

These factors are not a rigid test but are simply criteria for the court to consider.

Howick v. Campbell-Ewald Co., ARB Nos. 03-156 and 04-065, ALJ Nos. 2003-STA-6 and 2004-STA-7 (ARB Nov. 30, 2004) (ALJ properly weighed factors; record supported ALJ's findings and recommendation to dismiss).

[STAA Whistleblower Digest XII B 1 c i]
PROTECTED ACTIVITY; ALLEGATION OF LEAKING BRAKE FLUID

An allegation of leaking brake fluid clearly is within the ambit of DOT's safety regulations and is protected activity under Section 31105(a)(1)(A) of the STAA. ***Densieski v. La Corte Farm Equipment***, ARB No. 03-145, ALJ No. 2003-STA-30 (ARB Oct. 20, 2004).

[STAA Whistleblower Digest XIII D]
MOOTNESS DOCTRINE; AVAILIBILITY OF ATTORNEY'S FEES DOES NOT PREVENT A CASE FROM BECOMING MOOT; REQUEST FOR ABATEMENT; CAPABLE OF REPETITION, YET EVADING REVIEW STANDARD

In ***Agee v. ABF Freight System, Inc.***, 2004-STA-40 (ALJ Sept. 27, 2004), the Complainant called in sick and several days later the Employer issued a warning notice citing the Complainant for habitual absenteeism. Thereafter the Complainant filed a STAA whistleblower complaint alleging that the warning notice violated the STAA, and requesting that the Employer be ordered to expunge the letter from the Complainant's file, abate the violations, and pay the Complainant's attorney's fees and costs. Under the relevant collective bargaining agreement warning notices were required before the Respondent could discipline employees for habitual absenteeism. The CBA also provided that such notices only remain in effect for nine months. By

the time the matter reached the ALJ, the nine months had passed and the Respondent moved for summary decision under the doctrine of mootness.

The ALJ found the Complainant's response to the motion for summary decision was unpersuasive and that the case was moot. The Complainant argued that the Complainant was entitled to an award of attorney's fees. The ALJ, however, found that potential entitlement to attorney's fees was not a sufficient interest to save the claim from mootness. The ALJ found that the Complainant's demand for an order of abatement did not present an actual case or controversy because the expiration of the notice, in effect, healed his injury. The ALJ found that the Employer had never exploited the warning notice and was not engaged in any ongoing activity that the ALJ could direct it to abate. The ALJ also found that the Complainant had not demonstrated that the "capable of repetition, yet evading review" exception to the mootness doctrine applied.

[STAA Whistleblower Digest XIII D]
SUMMARY JUDGMENT; MOOTNESS DOCTRINE; EMPLOYER WITHDREW SUSPENSION LETTERS AND COMPLAINANT HAD SUFFERED NO LOST TIME, WAGES OR BENEFITS

In ***Ciofani v. Roadway Express, Inc.***, 2004-STA-46 (ALJ Nov. 18, 2004), the ALJ recommended summary judgment in favor of the Respondent where, prior to hearing, the Respondent rescinded all suspension letters that had been the subject of the complaint, the Complainant had not served any of the suspensions, and all references to the suspension letters were removed from his personnel file. The Complainant did not incur any lost time, wages or benefits related to the suspension letters. The ALJ agreed with the Respondent that the complaint had been mooted, and noted that the Sixth Circuit had so ruled in a similar case, *Thomas Sysco Food Services v. Martin*, 938 F.3d 60 (6th Cir. 1993). The Complainant contended that the dispute was not moot because there remained claims for attorney fees and costs, a request for an order of abatement, and his belief that he could be subjected to the same action in the future. The ALJ rejected these contentions, finding that attorney fees or costs could not be awarded because the Secretary had not issued an order under § 31105(a)(3)(A), that an order to abate was not appropriate because the Secretary had found no merit to the complaint and because the withdrawal of the letters left nothing to abate. Finally, the ALJ did not find facts sufficient to support a "capable of repetition, yet avoiding review" exception to the mootness doctrine.